Filed 2/22/19 La Jolla Shores Tomorrow v. City of San Diego CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LA JOLLA SHORES TOMORROW, Plaintiff and Appellant, v. CITY OF SAN DIEGO, Defendant and Respondent, BOB WHITNEY et al. Real Parties in Interest and Respondents.	D072140 (Super. Ct. No. 37-2015-00037115-CU-TT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Affirmed.

The Law Office of Julie M. Hamilton, Julie M. Hamilton and Joseph Bruno for Plaintiff and Appellant.

Mara W. Elliot, City Attorney, Glenn T. Spitzer and Heidi Vonblum, Deputy City Attorneys, for Defendant and Respondent.

Varco & Rosenbaum Environmental Law Group, Suzanne R. Varco and Jana Mickova Will for Real Parties in Interest and Respondents.

La Jolla Shores Tomorrow (LJST) appeals a judgment denying its Code of Civil Procedure section 1094.5[1] petition for writ of mandate that challenged a decision by the City of San Diego (City) approving construction of a building proposed by real parties in interest Bob Whitney and Playa Grande, LLC (together Playa Grande) in the community of La Jolla Shores and certifying the final environmental impact report (FEIR) for that project. On appeal, LJST contends that City: (1) violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) because the San Diego City Council (City Council) did not have the authority to consider the project approvals when it considered the FEIR; (2) violated section 113.0273 of the San Diego Municipal Code (Municipal Code) and did not proceed in the manner required by law because it approved the project without requiring visibility triangles;[2] and (3) did not proceed in the manner required by law because it approved the project with driveways in excess of those permitted by Municipal Code section 142.0560. Based on our reasoning *ante*, we conclude the trial court correctly denied the petition for writ of mandate.

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1 Undesignated references are to the Code of Civil Procedure.

2 A visibility triangle is a triangular area without structures that allows adequate sight distance for safe vehicle and pedestrian movement at intersections with a public right-of-way. (Mun. Code, § 113.0273.)

FACTUAL AND PROCEDURAL BACKGROUND

In 2009 Playa Grande applied for a site development permit, coastal development permit, and tentative map waiver to demolish an existing 1,519-square-foot single-story residential building and an existing 1,538-square-foot single-story commercial building and construct a new three-story mixed-use building (Project) in the community of La Jolla Shores. The Project's site encompasses two lots totaling 3,952 square feet and is surrounded by mixed-use, commercial, office, and multi-family residential development. The Project will include 1,867 square feet of ground floor retail space, a 3,179-square-foot second floor condominium, a 2,780-square-foot third floor condominium, and 3,257 square feet of underground parking. The Project will be set back 10 feet from its eastern neighbor, a three-story mixed-use building. The Project will include a 15-foot by 15-foot entry plaza/visibility triangle at its southwest corner located at the intersection of Avenida de la Playa and El Paseo Grande and a visibility triangle at its northwest corner located at the intersection of El Paseo Grande and Calle Clara. An open carport accessed from Calle Clara will be located at the Project's northwest corner and underground parking for the condominiums will be accessed from Calle Clara through mechanical garage doors and two car elevators.

In 2009 City prepared an initial study under CEQA for the Project. In 2010 a mitigated negative declaration (MND) was completed and circulated for public comment. A City hearing officer adopted the MND and approved the Project's entitlements. City's planning commission (Planning Commission) denied an appeal, adopted the MND, and approved the Project's entitlements. After the City Council granted an appeal from that

decision, the Planning Commission again adopted the MND and approved the Project's entitlements. The City Council granted a second appeal, finding there was substantial evidence that the Project might have significant environmental impacts. Thereafter, Playa Grande revised the Project by reducing its total square footage, adding car elevators, increasing setbacks, and modifying its design.

In June 2011 City issued a notice of preparation (NOP) and received public comments. In 2013 City prepared a draft environmental impact report and circulated it for public comment. City responded to the public comments in the FEIR, which it circulated in 2015. As a result of public comments, the Planning Commission required further modifications to the Project, including a 15-foot setback on its eastern side. In April 2015 the Planning Commission certified the FEIR and approved the Project's entitlements. In October 2015 the City Council denied an appeal and approved certification of the FEIR.

In November 2015 LJST filed the instant section 1094.5 petition for writ of mandate, alleging City failed to proceed in the manner required by law by violating CEQA and/or the Municipal Code. LJST sought a writ of mandate ordering City to set aside its certification of the Project's FEIR and its approval of the coastal development permit, site development permit, and tentative map waiver for the Project. City and Playa Grande filed a joint opposition to the petition. Following oral argument, the trial court ruled in City's favor, finding: (1) City's process for environmental appeals complies with CEQA's requirements; (2) City properly concluded the Municipal Code does not require visibility triangles for the Project; and (3) City properly concluded the Project does not

propose development of parking facilities that are regulated by the Municipal Code. On February 24, 2017, the court entered judgment for City on the petition. Subsequently, the court denied LJST's motion for a new trial. LJST timely filed a notice of appeal.[3]

On December 20, 2017, we denied without prejudice LJST's December 6, 2017 motion for judicial notice of four exhibits. On February 15, 2018, LJST refiled its motion for judicial notice, requesting that we exercise our discretion under Evidence Code sections 452, 453, and 459 to take notice of the four exhibits attached thereto. On February 22, 2018, we deemed its motion for judicial notice of exhibit 3 to be a motion to augment the record and granted that motion to augment, and we deferred ruling on its motion for judicial notice of exhibits 1, 2, and 4 for consideration concurrently with this appeal.[4] Because those exhibits should have, but were not, presented to the trial court and/or did not exist at the time of City's October 2015 decision, we now decline to exercise our discretion to take judicial notice of those exhibits and deny LJST's motion for judicial notice of exhibits 1, 2, and 4.[5] (Evid. Code, §§ 452, subd. (d), 453, 459,

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[3] On April 4, 2018, we denied the joint motion of City and Playa Grande to consolidate the instant appeal with the appeal in case No. D072215, filed by Bernard I. Segal, which also involves the Project. However, we granted their alternative motion to coordinate the appeals. Both cases have been decided by the same panel.

[4] Those exhibits include: (1) minutes of the City Council meeting held on April 5, 2016; (2) minutes of the City Council meeting held on August 2, 2011; and (3) pages 12 and 13 of the City staff report, dated January 6, 2016, to the Planning Commission.

[5] On March 26, 2018, City and Playa Grande filed a joint conditional motion for judicial notice requesting that we take judicial notice of two exhibits attached thereto *only* in the event we granted LJST's motion for judicial notice. That motion is denied as moot.

subd. (a); *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-326; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; *CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 520.)

DISCUSSION

I. *CITY'S ENVIRONMENTAL APPEALS PROCESS*

LJST contends the trial court erroneously denied its petition for writ of mandate because City's process for appeals of environmental decisions and approvals of projects violates CEQA by not requiring those determinations to be made by the same decision-making body. In particular, LJST argues that although the Planning Commission certified the FEIR and approved the Project's entitlements, the Municipal Code allowed an appeal to the City Council of only the Planning Commission's certification of the FEIR.

A. *Denial of Petition*

In October 2015, after the Planning Commission had certified the FEIR and approved the Project's entitlements, the City Council heard and denied an appeal and approved certification of the FEIR. The public agenda for the City Council's consideration of the appeal stated in pertinent part: "If the City Council grants the appeal, the lower-decision maker's decision to approve the project shall be held in abeyance. The City Council shall retain jurisdiction to act on the revised environmental document and associated project at the subsequent public hearing."

In denying LJST's petition for writ of mandate, the trial court concluded City's process for environmental appeals did not violate CEQA. The court stated:

"CEQA is violated when the authority to approve or disapprove the project is separated from the responsibility to complete the environmental review. [Citation.] The environmental review document must be reviewed and considered by the same person or group of persons who make the decision to approve or disapprove the project at issue in order to comply with CEQA's basic purpose of informing governmental decision makers about environmental issues. [Citation.] The separation of the approval function from the review and consideration of the environmental assessment is inconsistent with the purpose served by an environmental assessment as it insulates the person or group approving the project from public awareness and the possible reaction to the individual members' environmental and economic values. [Citation.] In short, a decision-making body's responsibilities are twofold: (a) whether to approve the project and (b) considering and adopting the environmental review document. [Citation.] A lead agency, such as the City, may delegate both types of authority to a nonelected, subordinate body, provided it also provides for an appeal to the lead agency's elected decision-making body. [Citation.]

"CEQA Guidelines [California Code of Regulations, title 14,] section 15185[, subdivision] (a) provides that a lead agency may establish its own procedures for environmental appeals. The City's procedure for appeals is set forth in [Municipal Code] section 112.0520. The process set forth within this Municipal Code section complies with the requirements of CEQA such that the City proceeded as required by law. If an appeal is granted pursuant to [Municipal Code] section 112.0520[, subdivision] (d)(2), then the lower decision is held in abeyance until the environmental document is addressed by the City Council. The City Council is empowered to reconsider the environmental document and the project before project approval and certification of the [environmental impact report]. The City Council, as the final decision-maker, retains the ability to address the project and can modify or deny the project at the final hearing. . . . In this action, the decision on the project and [FEIR] was made by a single decision-making body, the Planning Commission. The appeal of the [FEIR] held the Planning Commission's approval in abeyance, giving the City Council jurisdiction to act on a revised environmental document and associated project at a subsequent public hearing. . . . Therefore, LJST's contention lacks merit."

Accordingly, the court denied LJST's petition.

B. *CEQA Requirements*

" 'The basic purposes of CEQA are to: [¶] (1) Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities. [¶] (2) Identify ways that environmental damage can be avoided or significantly reduced. [¶] (3) Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible. [¶] (4) Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved.' (Cal. Code Regs., tit. 14, § 15002.)' " (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 285-286.) When a proposed project will arguably have significant environmental effects, CEQA requires a public agency to prepare an [environmental impact report] before giving project approval. (*Id.* at p. 286.)

Public Resources Code section 21061 generally requires an environmental impact report (EIR) or other environmental review document to be considered by a public agency prior to its approval or disapproval of a project.[6] Similarly, California Code of Regulations, title 14, section 15004, subdivision (b)(2),[7] provides: "[P]ublic agencies

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6 Public Resources Code section 21061 provides that an EIR "is an informational document which, when its preparation is required by [CEQA], shall be considered by every public agency prior to its approval or disapproval of a project."

7 All references to regulations are to the California Code of Regulations. The regulatory guidelines implementing CEQA are found therein at title 14, section 15000 et seq. (Guidelines).

shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance." In *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681 (*POET*), the court stated:

> "[CEQA's] purposes are best served when the environmental review document, such as an EIR or its equivalent, 'provide[s] decision makers with information they can use in deciding *whether* to approve a proposed project, not [informs] them of the environmental effects of projects that they have already approved.' [Citation.] When an environmental review occurs after approval of the project, it is likely to become nothing more than a post hoc rationalization to support action already taken. [Citation.] In short, the policy declaration in [Public Resources Code] section 21002 implies that an evaluation of environmental issues, such as feasible alternatives and mitigation measures, should occur *before* an agency approves a project." (*Id*. at p. 715.)

Guidelines section 15356 defines the term "[d]ecision-making body" as "any person or group of people within a public agency permitted by law to approve or disapprove the project at issue." Public Resources Code section 21151, subdivision (c), provides: "If a nonelected decisionmaking body of a local lead agency certifies an [EIR], approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency's elected decisionmaking body, if any." The Guidelines provide that a local agency with an elected decisionmaking body "shall provide for such appeals" and provide that an agency may establish its own procedures for such appeals. (Guidelines, §§ 15090, subd. (b), 15185, subd. (a).)

Because LJST challenges the trial court's conclusion on the question of law whether City's environmental appeal process complied with CEQA's requirements, we apply a de novo standard of review. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.)

C. *Process Three*

LJST argues City violated CEQA because its process for appeals of environmental decisions and approvals of projects did not require those determinations to be made by the same decision-making body. We disagree.

LJST does not dispute that City applied its "Process Three" (Mun. Code, § 112.0501 et seq.) in reviewing the Project. However, contrary to LJST's assertion, the administrative record indicates that City applied the 2011 version of that process, and not its former 2009 version, when the Planning Commission and City Council considered the Project in 2015. In particular, as noted *ante*, the public agenda for the City Council's October 5, 2015 meeting and consideration of the appeal stated in pertinent part: "If the City Council grants the appeal, the lower-decision maker's decision to approve the project shall be held in abeyance. The City Council shall retain jurisdiction to act on the revised environmental document and associated project at a subsequent public hearing." That description of City's process reflects the 2011 version of its Process Three, as discussed *post*. LJST, City, and Playa Grande agree that the abeyance language in the 2011 version

of section 112.0520 of the Municipal Code did not exist in its former 2009 version.[8] Furthermore, our independent review of the record shows that City applied the 2011 version of Process Three.[9]

In *Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161 (*Clews*), we explained Process Three:

> "Under Process Three, an application may be approved, conditionally approved, or denied by a hearing officer at a public hearing. ([Mun. Code], § 112.0505.) The hearing officer must comply with CEQA's environmental review and certify or adopt the appropriate environmental document (e.g., negative declaration, MND, or EIR). ([Mun. Code], § 128.0311[, subd.] (a)].) The hearing officer's decision may be appealed to the [P]lanning [C]ommission within 10 business days by filing an application with the City Manager. (*Id*., § 112.0506.) The [P]lanning [C]ommission may affirm, reverse, or modify the decision being appealed. (*Id*., § 112.0506, subd. (f).)

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8 On LJST's request, we ordered the record to be augmented to include the "strikeout ordinance" from the minutes of the August 2, 2011 City Council meeting. The former version of Process Three reflected in that strikeout ordinance did not include the abeyance language included in the amendment to section 112.0520 of the Municipal Code adopted by the City Council at that 2011 meeting.

9 Although LJST cites to excerpts from the administrative record regarding comments made at a April 16, 2015 Planning Commission hearing by its chairperson and a deputy city attorney in support of its argument that City necessarily applied the former 2009 version of Process Three, we are unpersuaded that the comments reflected in those record citations show that in 2015 City actually applied the former 2009 version instead of the then-current 2011 version of Process Three in conducting its environmental review and project approval of the Project. Those comments express their (correct) understanding that only the Planning Commission's certification of the FEIR, and not its approval of the Project, was appealable to the City Council. As discussed *post*, that understanding was consistent not only with the 2011 version of Process Three, but also with CEQA's requirements.

"The [Municipal Code] contains a separate section describing the procedure for environmental determination appeals. ([Mun. Code], § 112.0520.) The [Municipal Code] defines an 'environmental determination' as 'a decision by any non-elected City decision maker, to certify an environmental impact report, adopt a negative declaration or mitigated negative declaration, or to determine that a project is exempt from [CEQA] . . . .' (*Id.*, § 113.0103.) The procedure for environmental determination appeals applies regardless of the decision process adopted by the City: 'Notwithstanding other provisions of this Code, any person may appeal an environmental determination not made by the City Council.' (*Id*., § 112.0520, subd. (a), italics omitted.) . . .

"The City Council may grant or deny the appeal. ([Mun. Code], § 112.0520, subd. (e).) If the City Council denies the appeal, it will 'approve the environmental determination and adopt the CEQA findings and statement of overriding considerations of the previous decision[]maker, where appropriate.' (*Id*., § 112.0520, subd. (e)(2), italics omitted.) If the City Council grants the appeal, it will set aside the environmental determination and return it to City staff for reconsideration. (*Id*., § 112.0520, subds. (e)(2), (f)(2).) 'The Planning Director shall reconsider the environmental determination . . . and prepare a revised environmental document as appropriate, in consideration of any direction from the City Council.' (*Id*., § 112.0520, subd. (f)(2), italics omitted.) *During this time*, '[*t*]*he lower decision*[]*maker's decision to approve the project shall be held in abeyance. The City Council shall retain jurisdiction to act on the revised environmental document and associated project at a subsequent public hearing.*' (*Id*., § 112.520, subd. (f)(1).)

"*At the subsequent hearing, the City Council has the power to consider the revised environmental document and the associated project.* 'At a subsequent hearing, the City Council shall again consider the environmental determination and associated projects, and may take action as follows: [¶] (A) Certify or adopt the environmental document; adopt CEQA findings and statement of overriding considerations as appropriate; and affirm the previous decision to approve the associated project; [¶] (B) Certify or adopt the environmental document; adopt CEQA findings and statement of overriding considerations as appropriate; condition and approve the associated project as modified; or [¶] (C) Find that the environmental document is insufficient, in which case the document shall not be certified. The associated project shall be denied and the

> decision shall be deemed the final administrative action.' ([Mun. Code], § 112.0520, subd. (f)(3), italics omitted.)" (*Clews*, 19 Cal.App.5th at pp. 185-186, italics added.)

Clews concluded the Municipal Code provisions cited in its opinion "establish[ed] a bifurcated appeals procedure for Process Three decisions made by a hearing officer." (*Clews*, 19 Cal.App.5th at p. 186.) While a hearing officer's decision may be appealed to the Planning Commission, his or her environmental determination must simultaneously be appealed to the City Council. (*Ibid*.) Accordingly, "an appeal to the Planning Commission covers only the nonenvironmental project approvals (e.g., permits), while an appeal to the City Council covers the environmental determination. If the City Council grants the appeal, however, it may consider the nonenvironmental project approvals as well." (*Id*. at pp. 186-187.)

In *Clews*, we rejected the claim that City's bifurcated appeals process was invalid under CEQA. (*Clews*, *supra*, 19 Cal.App.5th at pp. 187-189.) We stated:

> "The City's procedure . . . complies with [CEQA's] requirements. Under Process Three, the hearing officer has the authority to approve the project and comply with CEQA's environmental review. ([Mun. Code], §§ 112.0505, 128.0311, subd. (a).) The hearing officer is therefore the City's decisionmaking body under the Guidelines. And, because the hearing officer is unelected, the City's procedures allow an appeal of the hearing officer's environmental determination to the City's elected City Council. ([Mun. Code], § 112.0520.)" (*Clews*, at pp. 187-188.)

In that case, the hearing officer's adoption of the environmental document for the project was "procedurally proper" because the hearing officer "also had the authority to approve the project." (*Id*. at p. 188.) Furthermore, "City's procedure establishing an appeal to the City Council to challenge the hearing officer's adoption of the [environmental document]

was likewise proper." (*Ibid*.) We rejected the argument that City's procedures were inadequate "because the Planning Commission has authority over project approvals but not the environmental determination." (*Ibid*..) That purported inadequacy "does not affect the validity of the hearing officer's environmental determination." (*Id*. at pp. 188-189.)

In *Clews*, we also rejected the argument that City's procedures were invalid because approval of a project under Process Three progresses from the hearing officer to the Planning Commission. (*Clews*, *supra*, 19 Cal.App.5th at p. 189.) Although no independent appeal to the City Council of the hearing officer's approval of a project is authorized (other than his or her environmental determination) and the Planning Commission's determination regarding that approval is ostensibly final, "[i]f the City [Council] grants the environmental determination appeal, however, [the City Council] has such authority [to approve or disapprove the project]. ([Mun. Code], § 112.0520, subd. (f).)" (*Ibid*.) "Neither CEQA nor the Guidelines require that a local agency's elected decisionmaking body accept appeals regarding every project approval, separate and apart from environmental review. They require only that the environmental determination be appealable. [Citations.] The City's procedures allow exactly that." (*Ibid*.)

In this appeal, LJST argues that City's procedures violated CEQA because although the Planning Commission certified the FEIR and approved the Project's entitlements, the Municipal Code allowed an appeal to the City Council of only the Planning Commission's certification of the FEIR and not its approval of the Project's entitlements (e.g., permits). However, *Clews* compels the conclusion that City's

procedures complied with CEQA's requirements. As in *Clews*, in this case the hearing officer conducted the initial environmental review and made the project approval determinations. After the hearing officer adopted the MND and approved the Project's entitlements, the Planning Commission denied an appeal, adopted the MND, and approved the Project's entitlements. After the City Council granted an appeal from that decision, the Planning Commission again adopted the MND and approved the Project's entitlements. However, the City Council granted a second appeal and found there was substantial evidence that the Project might have significant environmental impacts. As a result of the City Council's grant of that appeal, the Planning Commission's decision to approve the Project was held in abeyance and the City Council retained jurisdiction to consider a revised environmental document and the Project. (Mun. Code, § 112.0520, subd. (f)(1).)

City prepared the draft environmental impact report and circulated it for public comment. City considered and responded to the public comments in the FEIR, which it circulated in 2015. On April 16, 2015, after requiring further modifications to the Project, the Planning Commission certified the FEIR and approved the Project's entitlements. On October 5, 2015, the City Council denied an appeal and approved certification of the FEIR. In so doing, the City Council considered the Planning Commission's environmental determination and the Project and certified the FEIR. (Mun. Code, § 112.0520, subd. (f)(2), (3).) Because the Planning Commission's decision to approve the Project was held in abeyance after the City Council granted the CEQA appeal, that decision became final on City Council's subsequent decision to certify the

FEIR. (Mun. Code, § 112.0520, subd. (f)(1), (3)(A).) Therefore, at its October 5, 2015 meeting, the City Council acted as the final decision maker under CEQA when it considered and approved certification of the FEIR and, in effect, simultaneously approved the Planning Commission's decision to approve the Project, which decision had been held in abeyance pending further environmental review.[10] As stated *ante*, CEQA does not require that a local agency's elected decisionmaking body (e.g., City Council) accept appeals from every project approval. (*Clews*, *supra*, 19 Cal.App.4th at p. 189.) Rather, CEQA requires only that the environmental determination (e.g., FEIR certification) be appealable to that elected decisionmaking body (e.g., City Council). (*Clews,* at p. 189.) Because the hearing officer and the Planning Commission, at the times of their respective decisions, were responsible for complying with CEQA's environmental review requirements (e.g., certifying the FEIR) at the same time as they were responsible for approving the Project, the same decisionmaking body was responsible for both decisions and there was no bifurcated decisionmaking. (*Clews,* at pp. 187-189.) Accordingly, City's decisionmaking process did not violate CEQA.

None of the cases cited by LJST are apposite to this case or otherwise persuade us to reach a contrary conclusion. (See, e.g., *Kleist v. City of Glendale* (1976) 56

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10 LJST concedes that the 2011 version of section 112.0520 of the Municipal Code "does permit the City Council to consider the project when it considers the appeal of the environmental document." As discussed *ante*, we reject LJST's argument that City applied the former 2009 version, and not the then-current 2011 version, of section 112.0520 of the Municipal Code when the Planning Commission and the City Council considered and approved certification of the FEIR and approved the Project in 2015.

Cal.App.3d 770, 775-777 [city's environmental review procedures violated CEQA because they did not provide for review of EIR by its city council]; *POET*, *supra*, 218 Cal.App.4th at p. 731 [board's delegation to executive officer of authority to complete environmental review of project, but without delegating authority to approve project, violated CEQA]; *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 355, 360 [city's delegation to preservation commission of authority to approve permit for project, but without delegating authority to complete environmental review, violated CEQA].)

II. *VISIBILITY TRIANGLES*

LJST contends City did not proceed in the manner required by law because it approved the Project without requiring visibility triangles under section 113.0273 of the Municipal Code, which ordinance provides rules for measuring "visibility areas." In particular, it argues that ordinance required visibility triangles at the intersections of Calle Clara and the Project's driveways.

A. *Background*

In 2010 City staff requested that the hearing officer approve a variance from Municipal Code section 113.0273's provisions for the Project's driveways with Calle Clara. However, the hearing officer found no variance was necessary because that ordinance provided only rules for calculation and measurement of visibility triangles when a specific ordinance or regulation required visibility triangles, but there was no specific provision of the La Jolla Shores Planned District Ordinance (PDO) (Mun. Code, § 1510.0101 et seq.) or other Municipal Code provision requiring visibility triangles for

the Project. The hearing officer reasoned that Municipal Code section 113.0273, which is part of chapter 11 of the Municipal Code, "exists to give guides to those people who are designing projects and enforce regulations. [¶] It's there to tell you how to implement a requirement. It tells you how to measure things. It's not a portion of the [M]unicipal [C]ode that tells you to do something. So unless you can point to a place in the [PDO] that says that visibility triangles are required for this site, I don't see where one is required." He stated: "All I see is that the measurement and visibility area section for rules and calculations tells you how to do it. [¶] I don't see anything that triggers it and makes it a requirement that needs to be done." Accordingly, the hearing officer denied City's request for a variance because a variance from Municipal Code section 113.0273 was not required for the Project.

Thereafter, the Planning Commission approved the Project's entitlements and subsequently reaffirmed those approvals after the City Council granted appeals under CEQA and returned review of the Project back to it. At each hearing, the Planning Commission heard and considered arguments by LJST and others that Municipal Code section 113.0273 and the PDO required visibility triangles for the Project. In particular, at the 2010 hearing when a planning commissioner asked a City staff member if any properties on Calle Clara were required to have visibility triangles, the staff member replied that none of the properties on the south side of Calle Clara had visibility triangles.[11] It was also noted that the south side of Calle Clara, which was originally

11 The Project's north side is located on the south side of Calle Clara.

dedicated as a public right of way in 1926, had a zero lot line for adjacent properties, low or no curbs, and no sidewalks. In its penultimate April 16, 2015 resolution approving the Project's entitlements, the Planning Commission found the Project complied with all applicable regulations of the Land Development Code (i.e., chapters 11, 12, 13, & 14 of the Municipal Code [per Mun. Code, § 111.0101, subd. (a)]) and did not propose any deviations therefrom. After the City Council denied the subsequent appeal, LJST filed the instant writ petition, again asserting that Municipal Code section 113.0273 requires the Project to include visibility triangles and, in particular, at the intersection of Calle Clara and the Project's driveways. In its order denying the petition, the trial court concluded that City properly concluded section 113.0273 of the Municipal Code did not require visibility triangles for the Project. The court stated:

> "Section 113.0273 [of the Municipal Code] acts to clarify and define the manner in which development regulations are applied. City staff reasonably interpreted the various Municipal Code sections [e.g., §§ 113.0201, 113.0202, 113.0273] such that they properly determined that a variance was not required for the Project. The [PDO] does not require visibility triangles. The determination that Calle Clara does not meet the minimum requirements for classification as a street, and instead functions as an alley, is supported by substantial evidence. This determination relies on a correct interpretation of the subject Municipal Code sections. As a result, the visibility triangle guidelines set forth within [Municipal Code] section 113.0273[, subdivision] (c) do not apply."

Accordingly, the court denied the petition.

B. *Interpretation of Statutes*

"Ultimately, the interpretation of a statute is a legal question for the courts to decide, and an administrative agency's interpretation is not binding." (*Sara M. v. Superior*

Court (2005) 36 Cal.4th 998, 1011.) Nevertheless, a past or contemporaneous construction of a statute by an administrative agency is entitled to great weight unless that construction is clearly erroneous or unauthorized. (*Id*. at p. 1012; *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4th 630, 657-658; *Zenker-Felt Imports v. Malloy* (1981) 115 Cal.App.3d 713, 720.) Likewise, the interpretation of an ordinance or other legislation by its enacting body "is of very persuasive significance." (*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021.)

"Courts must . . . independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal interpretation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.) "Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent—the 'weight' it should be given—is fundamentally *situational*." (*Id*. at p. 12.) In those situations in which an " 'agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion, [courts are] more likely to defer to an agency's interpretation of its own regulation than to [their] interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.' " (*Ibid*.) Greater deference is also given to interpretations by agencies where there are indications that senior agency officials have carefully considered those interpretations. (*Id*. at p. 13.)

C. *Municipal Code Section 113.0273*

LJST argues that Municipal Code section 113.0273 operates independently as a regulation requiring visibility triangles where Calle Clara intersects the Project's driveways. We disagree.

Article 3 of chapter 11 of the Municipal Code provides definitions for land development terms and rules for calculation and measurement when applicable land development regulations include certain terms or concepts. (Mun. Code, §§ 113.0101, 113.0201, 113.0202.) Municipal Code section 113.0201 provides:

> "*The purpose of this division* [i.e., Municipal Code chapter 11, article 3, division 2] *is to clarify and define the manner in which specific land development terms and development regulations are applied*. The intent is to provide the rules for calculating, determining, establishing, and measuring those aspects of the natural and built environment that are regulated by the Land Development Code [i.e., Municipal Code chapters 11, 12, 13, & 14]." (Italics added.)

Importantly, Municipal Code section 113.0202 provides:

> "*This division* [i.e., Municipal Code chapter 11, article 3, division 2] *applies to development when the applicable regulations include terms or concepts that are shown in Table 113-02A. The Rules for Calculation and Measurement* [i.e., Municipal Code chapter 11, article 3, division 2] *clarify development regulations and land development terms by expanding on the regulations and providing detailed explanations of pertinent aspects of the regulation*. *These rules govern the way in which the development regulations are implemented*. The land development terms and the sections for the corresponding rules are provided in Table 113-02A. The Rules for Calculation and Measurement of one regulation or term may be used in conjunction with another." (Italics added.)

The express language of Municipal Code sections 113.0201 and 113.0202 shows that the provisions of division 2 of article 3 of chapter 11 of the Municipal Code (i.e.,

"Rules for Calculation and Measurement") do *not* apply *unless* there is a specific development regulation that applies to a development project and includes terms or concepts set forth in Table 113-02A, which is part of Municipal Code section 113.0202. Alternatively stated, none of the provisions of division 2 of article 3 of chapter 11 of the Municipal Code apply independently to a development project in the absence of an underlying development regulation found elsewhere in the Land Development Code that applies to a particular development project. Absent a substantive development regulation found outside of division 2 of article 3 of chapter 11 of the Municipal Code that expressly applies to and requires visibility triangles for a specific project, Municipal Code section 113.0273 does not apply to that project.

Accordingly, contrary to LJST's assertion, Municipal Code section 113.0273, which is included within division 2 of article 3 of chapter 11 of the Municipal Code, does *not* apply independently to require visibility triangles for the Project. Table 113-02A lists certain land development terms and concepts for which division 2 provides rules for their calculation and measurement and then identifies the respective division 2 ordinance that provides those rules. Table 113-02A includes the term "[v]isibility area" as one such term or concept and identifies Municipal Code section 113.0273 as the division 2 ordinance that provides rules for calculation and measurement of visibility areas. (Mun. Code, § 113.0202.)

Municipal Code section 113.0273, titled "Measuring Visibility Area," provides:

> "The *visibility area* is a triangular portion of a *premises* formed by drawing one line perpendicular to and one line parallel to the *property line* or *public right-of-way* for a specified length and one

> line diagonally joining the other two lines, as shown in Diagram 113-02SS. [¶] No *structures* may be located within a *visibility area* unless otherwise provided by the applicable zone or the regulations in Chapter 14, Article 2 (General Development Regulations). [¶] . . .
>
> " . . . For *visibility areas* at the intersection of a *street* and driveway, one side of the triangle extends from the intersection of the *street* and the driveway for 10 feet along the *property line*. The second side extends from the intersection of the *street* and driveway for 10 feet inward from the property line along the driveway edge and the third side of the triangle connects the two."[12]

Although Municipal Code section 113.0273 includes certain language that is regulatory (i.e., "No *structures* may be located within a *visibility area* . . . ."), that language must be construed in the context of Municipal Code sections 113.0201 and 113.0202, as discussed *ante*. Accordingly, contrary to LJST's assertion, Municipal Code section 113.0273 does not apply independently to require visibility triangles for the Project.[13] Rather, there must be an underlying development regulation outside of division 2 of article 3 of chapter

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12 Although not relevant to LJST's arguments on appeal, Municipal Code section 113.0273 also provides: "(1) For *visibility areas* at the intersection of *streets*, two sides of the triangle extend along the intersecting *property lines* for 25 feet and the third side is a diagonal line that connects the two. [¶] (2) For *visibility areas* at the intersection of a *street* and *alley*, two sides of the triangle extend along the intersecting *property lines* for 10 feet and the third side is a diagonal line that connects the two."

13 Likewise, LJST's assertion that Municipal Code section 113.0273 is a "regulatory" ordinance does not persuade us that it applies to the Project independently of any underlying substantive development regulation that applies to the Project. Rather, assuming arguendo that ordinance is "regulatory" within the broad meaning of that term, the language of Municipal Code sections 113.0201 and 113.0202, as discussed *ante*, clearly shows that Municipal Code section 113.0273 does not operate independently to require visibility areas or triangles absent a separate, underlying development regulation that requires visibility areas or triangles for the Project.

11 of the Municipal Code that applies to the Project and requires the Project to have visibility triangles. However, LJST has not cited, nor have we found, any such underlying development regulation.

In particular, the PDO does not contain any such requirement for development in the La Jolla Shores Planned District. Had City intended to require development within that district to have visibility areas or triangles, it presumably knew how to do so and would have included such requirement in the PDO. For example, the La Jolla Planned District Ordinance (not to be confused with the La Jolla Shores Planned District Ordinance) expressly requires visibility areas in zones 5 and 6 of that neighboring community.[14] Therefore, by omitting such requirements from the PDO and other substantive provisions of the Municipal Code applicable to the La Jolla Shores Planned District, we, like the trial court, infer City intended that development in that district *not* be required to have visibility areas or triangles. Accordingly, without any such underlying development regulation applicable to the Project, Municipal Code section 113.0273 does not apply. Therefore, we conclude the trial court correctly found that a

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[14] Municipal Code section 159.0402, subdivision (b), provides: "Zones 5 and 6—Within every premises in Zones 5 and 6 there shall be established visibility areas adjacent to every street corner intersection, driveway (on or off the premises) and alley. These triangular areas shall be of the size, shape and location shown in Appendix F. Within a visibility area, no portion of any fence, wall or other structure shall exceed three feet in height." Furthermore, at the January 5, 2017 hearing on LJST's petition, Suzanne Varco, Playa Grande's counsel, represented to the trial court that the Municipal Code expressly requires visibility triangles in other planned districts (e.g., Mid-City Communities Planned District, Golden Hill Planned District, Mount Hope Planned District, and La Jolla Planned District).

variance from the application of Municipal section 113.0273 was not required for the Project.

D. *Calle Clara Is Not a "Street"*

Assuming arguendo that Municipal Code section 113.0273 applies notwithstanding the absence of any underlying development regulation applicable to the Project, we nevertheless conclude that City properly found that ordinance did not apply to the intersections of Calle Clara and the Project's driveways because Calle Clara is not a street and instead functions as an alley. We, like the trial court below, conclude there is substantial evidence to support that finding.

In response to public comments on the FEIR regarding the absence of visibility triangles, City stated:

> "Calle Clara is 30 feet wide. Pursuant to the definition of an alley in the [Municipal Code], Section 113.0103, an alley is a maximum of 25 feet wide. However, pursuant to the City's Street Design Manual (page 11), an alley is 20 feet wide, but may be wider to accommodate utilities. Utilities are located in Calle Clara. Accordingly, the fact that Calle Clara is 30 feet wide is not the only factor to be used in determining whether it is an alley. The narrowest double-loaded street as defined in the City's Street Design Manual is a minimum of 30 feet from curb-to-curb with a minimum 50-foot right of way plus sidewalks [citation]. Calle Clara does not have a 50-foot right of way nor does it have sidewalks or curbs on the south side where the [P]roject is located. Consequently, *Calle Clara does not meet the minimum requirements for classification as a street*.
>
> "Calle Clara's public right of way, on the north side and rear of the [P]roject site, was established along with the original block's Subdivision Map No. 1913, La Jolla Shores Unit No. 1, June 1, 1926, with the dedication of 10 feet for an unnamed public right of way (approximately 1/2 width of an alley) between Paseo del Ocaso and El Paseo Grande. Typical of an alley, the [P]roject site's entire

> block is currently developed as such with zero lot line development along the alley. Later, Subdivision Map No. 2061, La Jolla Shores Unit No. 3, Sept. 26, 1927, was recorded for the proposed subdivision on the north side of this unnamed alley. This subdivision map required the additional dedication of 20 feet of public right of way (approximately 1/2 width of a street) and identified the total 30 feet of public right of way as 'Calle Clara.' This subsequent subdivision's development produced street side features such as curb and gutter along portions of the north side of Calle Clara. *The combination of the two subdivision requirements has created a public right-of-way street with both street and alley features and does not meet the standards in the City's Street Design Manual for a street*. Technically, the northern 'half' of Calle Clara is 20 feet wide while the southern 'half' is only 10 feet wide. There are curbs along a small portion of the northern side of Calle Clara, but not on the south side. Development along the southern side observes a zero-foot setback as allowed in the [PDO]. Garage doors for all development on the south side of Calle Clara are located on the property line and none observe the visibility triangles pursuant to Municipal Code Section 113.0273. *Calle Clara has therefore traditionally functioned as an alley, not a street*.
>
> "Considering the unique situation and the existing development all along the southern side of Calle Clara observing a zero-foot setback as allowed in the [PDO], *the City Engineer has reviewed the* [*P*]*roject as proposed with zero-setback and consider*[*s*] *Calle Clara to be functioning as an alley rather than a street*. According to [Municipal Code] Section 113.0273, 'for visibility areas at the intersection of a street and alley, two sides of the triangle extend along the intersecting property lines for 10 feet and the third side is a diagonal line that connects the two.' *Therefore,* [*Municipal Code*] *Section 113.0273*[, *subdivision*] (*a*) *would not be applicable to the* [*P*]*roject*. . . ." (Italics added.)

As quoted *ante*, Municipal Code section 113.0273, subdivision (c) provides that for required "*visibility areas* at the intersection of a *street* and driveway, one side of the triangle extends from the intersection of the *street* and the driveway for 10 feet along the *property line*." Therefore, by its express terms, that provision for calculating and

measuring visibility areas does not apply unless there is an intersection of a "street" with a driveway.

Under section 1094.5, we review the trial court's decision denying LJST's petition for writ of mandate, and thus City's decision and its findings on disputed facts, for substantial evidence to support them. (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1057-1058; *Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1590; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515 ["Section 1094.5 clearly contemplates that at minimum, the reviewing court must determine both whether substantial evidence supports the administrative agency's findings and whether the findings support the agency's decision."].) "Substantial evidence . . . must be ' "of ponderable legal significance," ' which is reasonable in nature, credible and of solid value." (*JKH Enterprises, Inc.*, at p. 1057.) In applying the substantial evidence standard of review, we resolve all conflicts in the evidence and draw all reasonable inferences in support of City's decision and its factual findings. (*Id*. at p. 1058.) City's determination whether a particular public right-of-way constitutes a "street" within the meaning of Municipal Code section 113.0273 involves a weighing of the unique circumstances of a specific right-of-way in light of City's expertise and technical knowledge and therefore is primarily a factual, not legal, determination. Accordingly, the substantial evidence standard applies to our review of City's determination that Calle Clara is not a "street" within the meaning of Municipal Code section 113.0273. Because

neither those facts nor the reasonable inferences drawn therefrom are undisputed, City's determination does not involve a pure question of law that would be subject to de novo review. (Cf. *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479; *Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 867.)

Contrary to LJST's assertion, there is substantial evidence to support City's finding that Calle Clara is not a "street" within the meaning of Municipal Code section 113.0273. LJST notes that Municipal Code section 113.0103 defines an "[a]lley" as "a public way that is no wider than 25 feet that is dedicated as a secondary means of access to an *abutting property*." Based on that definition, LJST argues that because Calle Clara is 30 feet wide and therefore exceeds the maximum width (i.e., 25 feet) set forth in the Municipal Code's definition of an alley, Calle Clara must necessarily be considered a "street" within the meaning of Municipal Code section 113.0273. We disagree.

The proper analysis must begin with the Municipal Code's definition of "street" and any Municipal Code or other City guidelines for street design. Municipal Code section 113.0103 defines a "street" as "that portion of the *public right-of-way* that is dedicated or condemned for use as a public road and includes highways, boulevards, avenues, places, drives, courts, lanes, or other thoroughfares dedicated to public travel, but does not include *alleys*." Accordingly, contrary to LJST's contention, a public right-of-way that is not an alley is not necessarily a "street." Rather, only a public right-of-way that is dedicated or condemned for use as a public road (e.g., a thoroughfare dedicated to public travel) may be considered a "street" within the meaning of Municipal Code section 113.0103. Furthermore, in determining the meaning of a "street" under Municipal Code

section 113.0273, City properly considered its Street Design Manual. City and Playa Grande represent, and LJST does not dispute, that the narrowest right-of-way for a street allowed by City's Street Design Manual is 48 feet wide.

Given the above criteria for a "street," City then applied those criteria to the unique circumstances of Calle Clara and determined it was not a "street" within the meaning of Municipal Code section 113.0273 and, instead, functioned as an "alley" even though it exceeded the 25-foot width limitation for an alley under Municipal Code section 113.0103. This finding is supported by substantial evidence. Calle Clara was only 30 feet wide, had a zero lot line for properties on its south side, low or no curbs, and no sidewalks. On June 1, 1926, 10 feet of Calle Clara, comprising its southern "half," was dedicated for a public right of way and its adjacent properties were developed with a zero lot line. As City noted, garage doors for all development on the south side of Calle Clara are located on the property line and none of the properties thereon have visibility triangles. Based on those circumstances, City concluded that Calle Clara has traditionally functioned as an alley, and not a street, and therefore found that Municipal Code section 133.0273's provisions regarding visibility areas or triangles do not apply to the intersections between Calle Clara and the Project's driveways.[15]

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15 To the extent LJST asserts the determination whether Calle Clara is a "street" within the meaning of Municipal Code section 113.0273 involves instead a question of law for our independent determination, we nevertheless would have reached the same conclusion as City did had we reviewed that question de novo in the circumstances of this case.

III. *PARKING ORDINANCE*

LJST contends that City did not proceed in the manner required by law because it approved the Project with driveways along Calle Clara in excess of those permitted by Municipal Code section 142.0560. Without quoting specific language from that ordinance, LJST asserts Municipal Code section 142.0560 "allows one 20 foot-wide driveway for every 50 feet of street frontage." LJST argues the Project violates that ordinance because it "provides two parking spaces directly off Calle Clara and two entrances to the garage directly off Calle Clara for a total driveway width of 40 feet."

However, as we concluded *ante*, there is substantial evidence to support City's finding that Calle Clara is not a "street." Therefore, because Calle Clara is not a street, any driveways along Calle Clara are not subject to the purported limitation of one driveway per 50 feet of street frontage under Municipal Code section 142.0560 that LJST argues the Project violates.[16] Accordingly, the trial court correctly rejected LJST's argument that the Project violates Municipal Code section 142.0560.

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16 Because we reject LJST's argument on that ground, we need not, and do not, address the alternative arguments of City and Playa Grande that the Project does not involve any driveways and/or parking facilities within the meaning of Municipal Code section 142.0560.

DISPOSITION

The judgment is affirmed. City of San Diego, Playa Grande, LLC, and Bob Whitney shall recover their costs on appeal.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.